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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 187.

ZOILO MENDEZ RIOS,
Petitioner,

against

CLARENCE K. BOWIE, *et als.*, Trustees,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

EARLE T. FIDDLER,
Attorney for Respondents.

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Opinion Below.

The opinion of the Circuit Court of Appeals (R. 75), reported in 118 F. (2d) 435, is correctly cited in the Petition.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code.

Statement of the Case.

The complaint was filed by the Petitioner on January 17, 1939 (R. 1). The issue involved is the extent of the use made by Respondents of a right of way for a railroad over Petitioner's property. The Petitioner claims that the use exceeds the use authorized by the deed of grant and by law. The deed of grant, after describing the dominant and servient tenements provides (R. 77):

> "Fourth: The parties having agreed to constitute a servitude for the passage of a railroad they carry out the contract and execute this deed in the manner expressed in the following clauses:
>
> "First: Manuel Mendez Dueno for himself and as attorney in fact for his wife, Micaela Ríos Morales, grants to The Juncos Central Company, its successors or assignees, a perpetual right of way for a railroad line through, upon and across all and every one of the parcels hereinbefore described in paragraph two of this deed, . . . and the parties state that in all of the described properties the railroad has been installed for a long time. . . . The aforesaid servitude, as has been stated, is perpetual in character and is constituted in favor of the rural property (Juncos Central property) described in the third paragraph of the expositive part (of this document) as dominant tenement, and which is owned by The Juncos Central Company, the cars and engines of The Juncos Central Company being permitted in virtue of said servitude to run freely over the roads established without any restriction whatsoever, and said railroad may be repaired and conserved as required by the necessities of the service."

The Petitioner contends that the use of the railroad over his properties is limited to the hauling of freight terminating in and originating from the dominant tenement (Brief 6 ff.). Respondents contend, and the Circuit Court, affirming the judgment of the District Court, held,

that the extent of user is a matter which depends on the agreement of the parties to the deed of grant, and that the grant was one of unlimited user.

Summary of Argument.

I. The Circuit Court properly held that the terms of the original deed of grant determine the extent of user of the right of way.

II. The Circuit Court correctly interpreted the language of the deed granting the right of way.

III. The decision of the Circuit Court was not in conflict with any decisions of this Court nor did it overrule any decisions of the Supreme Court of Puerto Rico.

IV. No question of general public interest is involved.

ARGUMENT.

FIRST.

The Circuit Court properly held that the terms of the original deed of grant determine the extent of user of the right of way.

The Circuit Court followed and applied Sections 530 and 534 of the Civil Code (Petitioner's Brief 8), which provide:

> "Sec. 530 (Sp. 594).—Every owner of an estate has a right to charge it with all the servitudes he may deem fit, and in the manner and form he may consider as best, provided he does not violate the laws or public order."
>
> "Sec. 534 (Sp. 598).—The title, and in a proper case, the possession of a servitude acquired by pre-

> scription determines the rights of the dominant tenement and the obligation of the servient tenement. In default thereof, the servitude shall be governed by such provisions of this title as may be applicable."

Petitioner cites authorities (Brief pp. 8-11) to demonstrate that the Circuit Court correctly held that the servitude granted was a real rather than a personal servitude. Although immaterial to the argument, attention is called to the fact that the cases cited on page 9 of Petitioner's brief, do not sustain the proposition stated on p. 10, namely, that in order to affect third persons, a servitude for a right of way must be established by a public deed and be recorded in the Registry of Property. The Supreme Court of Puerto Rico has repeatedly held with the approval of the Circuit Court of Appeals, that where a servitude such as for a railway is apparent, third parties are bound by the terms of the agreement constituting the same, since they are put on inquiry by the apparent signs thereof, even though such agreement was not in a public instrument and was not recorded.

> *Colón* vs. *Plazuela Sugar Co.*, 47 P. R. R. 827;
> *Félix del Llano* vs. *Plazuela Sugar Co.*, 55 D. P. R. 583 (Sp. Ed.);
> *Pacheco* vs. *Plazuela Sugar Co.*, 56 D. P. R. 496 (Sp. Ed.);
> *Méndez* vs. *Eastern Sugar Associates*, 89 Fed. (2d) 399, 405.

Although Petitioner concedes that the Circuit Court correctly held that the servitude was a real servitude, Petitioner argues (Brief p. 12) that the Circuit Court in effect held that the use was a personal use.

The opinion of the Circuit Court is not susceptible of such interpretation nor does this result follow from the opinion. The Court held, and Petitioner concedes that it correctly held, that a real servitude was created by the deed in question; that it was necessary to designate a dominant

tenement in order to give the servitude the nature of a real servitude; that the use to which the servitude may be put is a matter of agreement between the parties. The Circuit Court gave effect to the provisions of Sections 530 and 534 of the Civil Code. The quotation from Scaevola in Petitioner's brief (pp. 17, 18) supports the opinion of the court.

The contention that the use to which the servitude may be put is to any extent a personal servitude is further refuted by the express language of the deed (supra) to the effect that it is in favor of the parcel described as dominant tenement.

The construction contended for by Petitioner would bring about an unusual result, namely, that the parties may create a real servitude in favor of a dominant tenement, but may not legally by voluntary agreement extend the use thereof beyond mere ingress and egress. Such a restriction would interfere with freedom of contract and the free disposal of property. It would make it legally impossible to create a real servitude for the running of through trains. It is not supported by the Civil Code, the decisions or the jurisprudence.

SECOND.

The Circuit Court correctly interpreted the language of the deed granting the right of way.

The pertinent part of the deed granting the servitude which the Circuit Court construed reads as follows (R. 77):

> "the cars and engines of The Juncos Central Company being permitted in virtue of said servitude to run freely over the roads established without any restriction whatsoever, and said railroad may be repaired and conserved as required by the necessities of the service."

The Circuit Court (R. 86) called attention to the fact that the same court in *Méndez* v. *Baetjer,* 106 Fed. (2d) 166, in referring to the same language in the same deed, had said that plainer language could scarcely have been used to show that the use of the railroad was unlimited, and also held that the deed, having been drawn by the grantor, must be construed most strongly against him.

The Circuit Court also stated that its opinion was strengthened by the statement in the deed that in all the described properties the railroad has been installed for a long time, and by the wide use to which the railroad had been put prior to the making of the deed in 1917.

The Circuit Court correctly interpreted and construed the applicable principles of law and the language of the deed, and correctly appraised the effects of the surrounding circumstances.

THIRD.

The decision of the Circuit Court was not in conflict with any decisions of this Court nor did it overrule any decisions of the Supreme Court of Puerto Rico.

The Petitioner has cited no decisions of the Supreme Court of Puerto Rico nor of this Court in conflict with the decision of the Circuit Court, and we know of no such decisions.

FOURTH.

No question of general public interest is involved.

The question raised in the Petition is solely a question of private property rights. No questions of general public interest or of conflict of judicial decisions are presented.

CONCLUSION.

The decision of the Circuit Court of Appeals was in all respects correct and the Petition should be denied.

Respectfully submitted,

EARLE T. FIDDLER,
Attorney for Respondents.

San Juan, Puerto Rico,
July 14, 1941.